IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1567

ROGER H. COMLY,
Petitioner,

vs.

TOWNSHIP OF LOWER SOUTHAMPTON,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

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The Respondent, Township of Lower Southampton, prays that your Honorable Court deny the Petition of Roger H. Comly for a Writ of Certiorari to issue to review the judgment and order of the Supreme Court of Pennsylvania rendered in these proceedings on February 11, 1977.

Respondent's Counter-Statement of the Case

On December 5, 1975, the Board of Supervisors of Lower Southampton Township, at Petitioner's request, conducted a public hearing to review charges of "conduct unbecoming an officer" filed against Petitioner by the Chief of Police of Lower Southampton Township.

Notice of the charges was first given to Petitioner by the Chief of Police by letter dated November 20, 1975. Said letter

notified Petitioner that his dismissal was sought for "conduct unbecoming an officer". The letter specifically described the offensive conduct under the heading "*charges of dismissal*" as:

> "(1) Shooting of a deer and possession of a deer in close season. (2) Hunting and shooting a deer while license was suspended and/or under revocation of license in violation of the Pennsylvania Game Commission Laws in the Commonwealth of Pennsylvania. Included in this letter of dismissal are copies of the Crime Prosecution report setting forth times, dates and places of violations of the Pennsylvania Game Commission of the Commonwealth of Pennsylvania" (R. 76(a)-77(a)).

Copies of three Crime Prosecution reports were attached to the Chief of Police's letter of November 20, 1975. Further, said letter notified Petitioner of his rights under the *Police Tenure Act of June 15, 1951*, P.L. 586, Sections 2, 4; 1961, June 14, P.L. 348, Sections 1, 4; 1965, July 19, P.L. 219, Sections 1, 4 (53 P.S. Sections 812, 814) and enumerated the grounds for removal of a regular full time police officer and a police officer's right to a hearing.

A copy of the November 20, 1975 letter addressed to Petitioner was filed with the governing body of Lower Southampton Township, the Board of Supervisors. On November 26, 1975, the Chairman of the Board of Supervisors wrote Petitioner that his dismissal was sought from the police department on the basis of the charges filed by the Chief of Police. Petitioner was again notified that he had a right to request a public hearing on the charges, and further, that if he was dissatisfied with the outcome of the hearing, that he would have a right of appeal to the Court of Common Pleas of Bucks County (R. 78(a); S.R. 88(b)-90(b)).[1]

[1] S.R. references are to Respondent's Supplemental Record filed in the Commonwealth Court.

The evidence presented at the December 5, 1975 hearing revealed that on December 5, 1974, Petitioner was arrested by a Pennsylvania Game Warden for "failure to produce the head of a deer upon demand of an officer", an offense under the Game Laws of Pennsylvania.[2]

After trial, Petitioner was found guilty and paid a fine and Court costs (S.R. 5(b)). Shortly thereafter, on December 16, 1974, Petitioner was charged with another Game Law violation, that of failing to yield to inspection by a game warden. After trial, Petitioner was again found guilty and paid a fine and Court costs (S.R. 6(b)). No appeal was taken from either one of the above convictions, and consequently, Petitioner's hunting license was suspended from September 1, 1975 to August 31, 1980 (S.R. 42(b), 11(b)). On November 9, 1975, Petitioner was charged with the killing of a deer without a license by Pennsylvania State Game Officer Edward Bond. At first, Petitioner lied to Officer Bond and denied killing the deer. Petitioner later recanted his denial, admitted that he had killed the deer, and pleaded guilty to the charge (S.R. 40(b)-41(b); 68(b)). Contrary to Petitioner's assertion that there was no adverse publicity arising out of Petitioner's Game Law violations, reports of Petitioner's conviction for hunting without a license appeared in the Bucks County Intelligencer on November 14, 1975 and the Bucks County Courier Times on November 21, 1975, both of which are newspapers of general circulation in Bucks County (S.R. 104(b)-106(b)).

Petitioner testified in his own defense at the December 5, 1975 hearing. It is significant to note that he admitted com-

[2] See generally, "The Game Law", 1937, June 3, P.L. 1225, Article I, *et seq.*, as amended (34 P.S. § 1311.102, *et seq.*).

mitting the three game law violations (R. 100(a)-102(a); S.R. 66(b)-83(b)) and admitted lying to Game Warden Bond concerning his shooting of a deer without a license on December 5, 1974 (S.R. 68(b)). Petitioner's lack of respect for the law and insensitivity to his oath of office was clearly illustrated by the following colloquy which took place between Officer Comly and Supervisor Holzworth at the December 5, 1975 hearing:

> By Mr. Holzworth:
>
> Q. Mr. Comly, Officer Comly, did it occur to you while you were hunting, you being a police officer, that you had a special obligation, being more knowledgeable of the law, that you should have been particularly observant of the Game Laws? Didn't that occur to you at the time?
>
> A. Well, I was with a set group of people. And I am not responsible for what everybody does in this group.
>
> Q. I am not saying that you are responsible for this, but you are responsible for your own actions?
>
> A. Yes, sir.
>
> Q. Didn't it occur to you that you as an officer of the law, sworn to uphold the law, didn't it occur to you that you were violating the law?
>
> A. It's a summary offense.
>
> Q. But it was a violation of the law, wasn't it?
>
> A. Yes.
>
> Q. You had a particular obligation to uphold the law, being a sworn police officer?
>
> A. I have no powers of a police officer outside the jurisdiction of the Lower Southampton Township.
>
> Q. That is not the question. The question is, you being a police officer sworn to uphold the law, you, in fact, violated the law. Didn't that occur to you at the time?
>
> A. When I was out of the township, yes.
>
> Q. You mean because you were out of the township that you were then relieved of your duty?

> A. I was off duty, out of uniform in another county, another township, on my private time. And I committed a summary offense for which I paid my fine.
>
> Q. It was a violation of the law.
>
> A. Yes, sir it was.
>
> Q. But being an officer of the law sworn to uphold the law of the Commonwealth, didn't it occur to you that you have a special obligation to uphold the law?
>
> A. No, no more than anyone else.
>
> (S.R. 74(b)-76(b)).

At the conclusion of the hearing, the board voted to dismiss Officer Comly on the basis of the recommendations submitted by the Chief of Police (R. 66(a)).

Subsequent to his dismissal by the Board of Supervisors, and pursuant to Section 815 of the *Police Tenure Act*, Petitioner appealed to the Court of Common Pleas of Bucks County for reinstatement. Although this was technically an "appeal" the Court heard additional testimony from various witnesses and thus treated the matter as a trial *de novo* (the Court also considered the Notes of Testimony of the December 5, 1975 hearing conducted by the Board of Supervisors of Lower Southampton Township). In its opinion, the Court of Common Pleas, as a factual matter, found that the Lower Southampton Township Board of Supervisors complied with the procedural requirements of the *Police Tenure Act*, in that:

> ". . . the police chief did give him a full and complete written statement of the charges against him together with all the applicable provisions of the law advising him of all of his various protections under the Act of Assembly, and we consider that these were adopted by the Board of Supervisors in its letter to him written over the signature of the Chairman of November 26, 1975. He was afforded a hearing before the Board of Township Supervisors within ten days of that letter as mandated by the Act of Assembly and we hold that the hearing was held in

such a way as to protect all of his various legal rights. He was present, represented by counsel, was afforded the opportunity of cross-examining the witnesses against him and was given and accepted the right to present evidence and testify on his own behalf."

(See Appendix B to Petitioner's Petition for a Writ of Certiorari at 10a, 11a).

In addition to Petitioner's procedural challenge, the Lower Court ruled on the substantive question that under Pennsylvania Case Law, Petitioner's conduct amounted to conduct unbecoming an officer which is grounds for dismissal under the *Police Tenure Act.* Likewise, the Lower Court's opinion dismissed Petitioner's "void for vagueness" challenge to the standard of "conduct unbecoming an officer" on the basis of Pennsylvania Appellate Court decisions holding to the contrary (See Appendix B to Petition for Writ of Certiorari, at 7a-12a).

Petitioner appealed the decision of the Lower Court to the Commonwealth Court of Pennsylvania. The only constitutional question presented to the Commonwealth Court was whether dismissal under the *Police Tenure Act* for "conduct unbecoming an officer" was unconstitutionally void for vagueness. *No other constitutional question was presented to the Commonwealth Court of Pennsylvania* (See Petitioner's Brief filed in the Commonwealth Court of Pennsylvania at 1-2). The Commonwealth Court of Pennsylvania affirmed the decision of the Lower Court and Petitioner then filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was denied *per curiam mem.* Again, the only constitutional question presented for review was whether dismissal for "conduct unbecoming an officer" was void for vagueness (See Petition for Allowance of Appeal which was filed in the Supreme Court of Pennsylvania, at 2-4).

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. Because Petitioner did not challenge his dismissal as a denial of procedural due process under the 5th and 14th Amendments before any State Court, and because he did not raise a facial overbreadth attack upon the statute before any State Court, he has waived his right to present both questions for review to your Honorable Court.

A constitutional right may be forfeited by failure to make timely assertion of the right sought to be protected. *Yakus vs. U.S.*, 64 S. Ct. 660, 321 U.S. 414. Waiver of constitutional rights is certainly not to be taken lightly and deserves close judicial scrutiny. See generally, *Miranda vs. Arizona,* 384 U.S. 436, 88 S. Ct. 1602 (1966). A thorough review of Petitioner's briefs filed in all Courts below, reveals that Petitioner never raised the federal question that Petitioner's 5th or 14th Amendments procedural rights were violated, although it is conceded that Petitioner challenged the procedures used to effectuate his dismissal as a matter of state law. Petitioner's only constitutional challenge below is that the standard of "conduct unbecoming an officer" is void for vagueness. Respondent respectfully submits that by failing to raise the question below, Petitioner has waived his right to present that question to your Honorable Court for review.

II. The procedures used by the Chief of Police and the Township Board of Supervisors in dismissing Officer Comly from the Lower Southampton Township Police Department met the procedural requirements set forth in the Police Tenure Act for removal of police officers, and as such, Petitioner was not denied procedural due process in violation of the 5th and 14th Amendments. Hence, there is no valid claim of denial of due process in violation of the 5th and 14th Amendments.

Petitioner does not challenge the constitutional sufficiency of the procedural requirements of the *Police Tenure Act.* Such procedures, Petitioner concedes, when properly applied meet the due process requirements of the 5th and 14th Amendments. See *Arnett vs. Kennedy,* 416 U.S. 134, 94 S. Ct. 1633 (1974); *Morrissey vs. Brewer,* 408 U.S. 471, 92 S. Ct. 2593 (1972).

None of Officer Comly's procedural rights as set forth in the *Police Tenure Act* were violated. On November 20, 1975, the police chief gave notice to Petitioner of the charges that were to be brought against him and the reasons for his discharge. By letter dated November 26, 1975, the Board of Supervisors advised Petitioner of the charges that had been filed against him, that he was entitled to a hearing and that if he was dissatisfied with the result, he could appeal to the Court of Common Pleas of Bucks County. Such procedures clearly meet the mandates of Sections 812 and 814 of the *Police Tenure Act.* Further, the Lower Court, found as a matter of fact that the procedural requirements of the *Police Tenure Act* were adhered to after hearing additional evidence and reviewing the record.

Petitioner relies upon the wording of the police chief's letter of November 20, 1975 (R. 75(a)-77(a)) and the wording of

the November 26, 1975 letter from the Board of Supervisors (R. 78(a)) to support the assertion that he was dismissed without a hearing and that the matter was prejudged. This contention was rejected by all Courts below and is clearly not well founded as a factual matter.

The chief of police had no power to hire or fire, but only the power to prefer charges of dismissal to the appointing authority. Dismissal for cause under the *Police Tenure Act* can only be effectuated by the appointing authority, and if a hearing is requested, only after hearing. Quite clearly, the legal effect of the police chief's letter of November 20, 1975 was only to prefer charges. The police chief may or may not have understood the procedures for dismissal required by the *Police Tenure Act.* However, he certainly understood that only the Board of Supervisors could hire or fire (R. 96(a)). More importantly, an examination of the police chief's letter of November 20, 1975 reveals that he intended to advise and afford Petitioner all procedural rights guaranteed by the *Police Tenure Act.*

Petitioner's assertion that the Board of Supervisors prejudged this matter and discharged Petitioner without hearing is ludicrous. The November 26, 1975 letter from the Board of Supervisors plainly adopted the charges for dismissal set forth in the police chief's letter of November 20, 1975. The supervisors' letter clearly advised Petitioner of his rights to a public or private hearing to present evidence with respect to the charges, and his subsequent rights of appeal to the Court of Common Pleas. The *Police Tenure Act* empowers the Board to suspend a police officer pending a hearing on dismissal. 53 P.S. 814. Obviously, this is the only effect of the November 26, 1975 letter from the Board of Supervisors, notwithstanding the exact wording. Other than Petitioner's

misconstrued interpretation of the aforesaid letters, no evidence was presented by Petitioner, either to the Board of Supervisors or to the Court of Common Pleas which would even suggest that the Board of Supervisors prejudged this matter or denied Petitioner an impartial hearing.

III. Because this Court has ruled that a statute which provides for dismissal for "conduct unbecoming an officer" is not void for vagueness, nor facially overbroad in view of the First Amendment, this case need not be reviewed by your Honorable Court.

Pennsylvania State Courts have defined "conduct unbecoming an officer" to be that conduct which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services. *Zeber Appeal,* 398 Pa. 35 (1959). It is conduct which adversely effects the moral or efficiency of the bureau to which one is assigned. *In re Baker,* 409 Pa. 143 (1962). In *Parker vs. Levy,* 417 U.S. 733, 94 S. Ct. 2547 (1974), your Court upheld the standard of "conduct unbecoming an officer" as not being void for vagueness. In *Arnett vs. Kennedy,* 416 U.S. 134, 94 S. Ct. 1633 (1974), where an employee was dismissed for conduct which impaired the "efficiency of the service" your Court held that such language was not subject to a facial overbreadth attack. A facial overbreadth attack will not be sustained where a limiting construction has been or could be placed on the challenged statute. Overbreadth facial attacks upon a statute are to be used sparingly by the Court and not where the challenged conduct falls squarely within the "hard core" of the statute's proscription. *Broadrick vs. Oklahoma,* 413 U.S. 60, 93 S. Ct. 2908 (1973).

Petitioner's conduct clearly falls within the *Police Tenure Act* "hard core" proscription. That is to say, it was not communicative conduct which men of ordinary intelligence and reasonable understanding would anticipate to be conduct unbecoming a police officer. Most importantly, a State Court's determination that Petitioner's conduct falls within the gambit of "conduct unbecoming an officer" cannot be construed to have an inhibiting or chilling effect upon other police officers desire to exercise fundamental First Amendment rights.

Finally, it should be noted that Petitioner's "property interest" in his job, arises solely by virtue of the *Police Tenure Act.* Petitioner, by asserting a facial overbreadth attack upon the standard "conduct unbecoming an officer" as set forth in the *Police Tenure Act,* in effect challenges the very statute which provides Petitioner with his "property interest". It is, of course, a fundamental principal of law, that except under ordinary circumstances, one can't challenge a statute upon which he seeks to reap benefits. *Arnett vs. Kennedy, supra.*

For the foregoing reasons, Petitioner lacks standing to raise a facial overbreadth attack upon the *Police Tenure Act.* And further, your Court's substantive holdings in *Arnett vs. Kennedy, supra* and *Parker vs. Levy, supra,* clearly indicate that the *Police Tenure Act's* proscription of "conduct unbecoming an officer" would stand a facial overbreadth attack.

Conclusion

For the foregoing reasons, a Writ of Certiorari should not issue to review the judgment and opinion of the Supreme Court of Pennsylvania.

Respectfully submitted,

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Certificate of Service

I, WILLIAM F. HEEFNER, attorney for Respondent, do hereby certify that three (3) copies of Respondent's brief in opposition to the grant of Petition for Writ of Certiorari were served by U.S. Mail, postage prepaid, first class, on August ...., 1977, addressed to MARTIN J. KING, Esq., CORDES, KING AND HOFFMAN, 27 S. State Street, Newtown, Pennsylvania, 18940. I further certify that all parties required to be served in this appeal have been served.

WILLIAM F. HEEFNER.